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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

## No. 919

JEANETTE E. GONDECK, Intervenor,
Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS,
INCORPORATED and
THE TRAVELERS INSURANCE COMPANY,
Respondents,

## RESPONSE TO EXTRAORDINARY PETITION FOR RE-HEARING

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## INDEX


| | | Page |
|---|---|---|
| I | Finality, Retrospection or Retrospectivity? | 1 |
| II | The Merits — Ecker's Case | 7 |
| III | The Merits — Rose's Case | 9 |
| IV | The Merits — Smith's Case | 10 |
| V | The Errors of Ecker | 11 |
| VI | Re-Trial | 20 |
| VII | Motion for Oral Argument | 22 |
| VIII | Conclusion | 22 |

1. Time has made so many changes, irreversible in Gondeck, that time and finality require a denial of the extraordinary petition for re-hearing. 22

2. Justice to the Employer and Carrier, their counsel and representatives require the doctrine of finality to be applied. 22

3. If the rule of Gondeck is sought to be reversed it should be reversed prospectively and not retrospectively. 22

4. The rule in Gondeck is sound as applied to the facts in Gondeck. 22

5. The distinctions between Ecker and Gondeck, the working by the employee in Ecker on a 365 day per year basis, which

Page

was not true in Gondeck, the injury "on a work day, so to speak, and in a manner not prohibited by the Employer," which was not true in Gondeck, makes the one case not in conflict with the other. 22

6. The legal issue in Ecker and the legal issue in Gondeck are not the same. 23

7. The distinctions between Rose and Gondeck are so obvious as to require no extended discussion. 23

8. The difference in record between Smith and Gondeck justify, if such be, the difference in judgment. 23

9. The basic legal principle, in Ecker, however, although not in conflict with Gondeck, is an erroneous legal principle pressed upon the Court without due and proper analysis, research and thought. 23

10. The basic question in Ecker is a question of law—that of reasonable recreation—and not one of fact. 23

11. The doctrine of reasonable recreation is a doctrine not provided by Congress but invented by deputy commissioners. 23

12. Oral Argument should be granted in this case and in Ecker if the Extraordinary Petition for Re-Hearing is to be granted. 23

CERTIFICATE OF SERVICE 24

## CASES AND AUTHORITIES


| | Page |
|---|---|
| A.B.A. Canons of Ethics | 2 |
| Alpert, Suits Against Administrative Agencies, 12 N.Y.U.L.Q. Rev. 393 (1935) | 13 |
| Ecker's Case—O'Keeffe vs. Smith, Hinchman & Grylls Associates, Inc. ____U.S.____, 85 S.Ct. 1102 (1965) | 7 |
| Hannah, Federal Remedies for Employee Injuries (1955) | 17 |
| John W. McGrath Corp. v. Hughes, 264 Fed. 314 (C.A. 2d 1959) | 13 |
| Pan American World Airways, Inc. vs. O'Hearne—Smith's Case—335 F.2d 70 (C F 4th 1964) | 10 |
| O'Keeffe vs. Pan American World Airways—Rose's Case—338 F2d 319 (C.A. 5th 1964) | 18 |
| O'Keeffe vs. Smith, Hinchman & Grylls Associates, Inc., Ecker's Case— ____U.S.____ 85 S.Ct. 1102 (1965) | 7 |
| O'Leary vs. Brown-Pacific Maxon, 340 U.S. 504, 71 S.Ct. 470 (1951) | 13, 19 |
| Report 1070—H.R. 77th Congress | 16 |
| Rose's Case—O'Keeffe vs. Pan American World Airways, Inc. 338 F2d 319 (C.A. 5th 1964) | 9 |
| Smith's Case—Pan American World Airways, Inc. vs. O'Hearne, 335 F2d 70 (C.A. 4th 1964) | 10 |
| U. S. vs. Ohio Power Co., 353 U.S. 98, 77 S.Ct. 652 (1957) | 5 |

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### I

### FINALITY, RETROSPECTION OR RETROSPECTIVITY

#### A

#### The Irreversibility of Time and Finality.

1.

This Brief is being written in June 1965.

In June 1962 Petition for Certiorari was denied (See Order of June 11, 1962.)

In October 1962 Petition for Re-Hearing was denied (See Order of October 8, 1962.)

But now, three years after June of 1962, because of an "Extraordinary Petition for Re-Hearing" we are re-considering, reviewing, re-weighing a lawsuit decided and closed three years earlier.

The closing of this case three years ago resulted in irreversible action on the part of many people, as well as the irreversible effects of time itself.

**In this case** the Employer Pan American World Airways and the Compensation Insurer completed and closed their premium arrangements. The various personnel completed and destroyed (or stored) various files. Counsel removed and selectively arranged his file. Counsel billed and was paid on the basis of, inter alia, the result accomplished. (See the A.B.A. Canons of Ethics, Rule 12.)

The delicate, arduous and at times inspirational and intuitive task of the lawyer in assembling the facts, studying and weighing the factors, reflectively considering the principles, determining the presentation, was completed.

All these factors are irreversible.

2.

When this Court issued its Mandate on October 8, 1962, then, contrary to what Petitioner at one point mentions but forbears to press because of its obvious unsoundness, this cause became a closed case.

Petitioner is not only unsound on this but also estopped, we suggest, because Petitioner moved to dismiss her appellate bond and close this case in December 1963—per copy of said Motion herewith:

**MOTION TO DISMISS BOND**

PAN AMERICAN WORLD AIRWAYS, INC., and THE TRAVELERS INSURANCE COMPANY,

Plaintiffs,

vs.

WILLIAM O'KEEFFE, Deputy Commissioner, Sixth Compensation District,

Defendant.

and

JEANETTE E. GONDECK,

Intervenor.

COMES NOW the Defendant JEANETTE E. GONDECK, and moves the Court for an order discharging her and her surety, NATIONAL SURETY CORPORATION, and their appellate bond posted herein, nunc pro tunc November 1, 1961, and represents that the Supreme Court

denied her petition for rehearing of its order denying her petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit, and that the Plaintiff has not filed any bill of appellate costs, nor has the Plaintiff incurred any taxable appellate costs.

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and then requested and obtained a Stipulation and Order discharging her—per copy herewith:

**STIPULATION AND ORDER**

PAN AMERICAN WORLD AIRWAYS, INC.,
and THE TRAVELERS INSURANCE CO.,
Plaintiffs,

vs.

WILLIAM O'KEEFFE, Deputy Commissioner,
Sixth Compensation District,
Defendant,

and

JEANETTE E. GONDECK,
Intervenor

It is hereby stipulated and agreed that the cost bond in the amount of TWO HUNDRED FIFTY and 00/100 ($250.00) DOLLARS, posted on appeal by the Intervenor JEANETTE E. GONDECK, and her surety NATIONAL SURETY

CORPORATION, may be cancelled and the parties discharged of their Liability thereunder, as of October 8, 1962.

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Attorney for Intervenor
/s/ Arthur Roth

LEO M. ALPERT, ESQ.
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Miami 32, Florida
Attorney for Plaintiffs
/s/ Leo M. Alpert

Stipulated and agreed this 30 day of December, 1963.

**ORDER**

IT IS SO ORDERED,

DONE AND ORDERED in Miami, Dade County, Florida, this 2nd day of January, 1964.

EMETT C. CHOATE
UNITED STATES DISTRICT JUDGE

3.

Now, years later, it is asserted on the authority of **U. S. vs. Ohio Power Co.,** 353 U.S. 98, 77 S.Ct. (1957) that the interests of justice require this closed case to be re-

opened because of intervening decisions, irreconcilable, so it is urged, with this closed case.

Adjudication must become final at some point.

When this Court denied the Petition for Re-Hearing approximately three years ago that point was reached.

That three years later the Court may wish it had ruled differently three years earlier does not, we suggest, give this Court the right or power to disturb a dead case.

That this Court three years later may wish to recede from a rule it announced three years earlier, is another matter altogether. The heart of the judicial process is the re-shaping or changing of earlier rules in later cases —but not by retrospective application to cases past and done with.

Finality is one thing; Retrospection another; Retrospective Application (Retrospectivity) still a third.

**B**

**The Justice of Finality**

**Ohio Power** enunciated a principle that "finality of litigation" must yield to the "interests of justice."

In the case at bar the Employer and the Carrier have a claim on justice also. Is it justice to require them to unsettle what they have settled? Or to require them to resuscitate an issue dead as to them with all the factors

that time has blurred and worn away from memory? Or to require them to make a defense to something new? To something that did not even exist at the time of their litigation?

Suppose this Court reverses and has to remand for a new hearing (and the supposition of a new hearing is not imaginative as we will later show if the Court does wish to reverse.) A new hearing over three years after a case was closed and over seven years after the accident has no claim on justice. We do not know whether the security employee who investigated the accident is available; we do not know if the other witnesses are available.

## II

## THE MERITS - ECKER'S CASE

### A

### Distinctions Between Ecker and Gondeck

The main thrust of Petitioner is the recent decision in **O'Keeffe vs. Smith, Hinchman & Grylls Associates, Inc.** —Ecker's Case—85 S. Ct. 1012, (March 29, 1965.)

We conceive the Court was misled in Ecker's Case, but misled or not, **Ecker** and **Gondeck** are two different cases and the decision in one does not control the other.

ITEM 1: In **Ecker** it was stipulated " . . . . that all employees worked on a 365 day per year basis when outside of the United States. * * * (See 222 F. Supp. at Page 7, Paragraph 10 of Stipulation.)

Not so with **Gondeck** who worked only regular and stated hours.

That alone is sufficient to distinguish away **Gondeck** from **Ecker.**

But the District Judge in **Ecker** further distinguished **Gondeck** away: He said:

ITEM 2: "In the Gondeck case the employee at the time of injury was, in the words of the Fifth Circuit in denying recovery (299 F.2d 77):

> ' * * * In an expedition made in the employer's jeep, which the employees were prohibited from using for such purposes.'
>
> In the case now before this Court the deceased Ecker was, by the terms of his employment, confined to the limits of the Korean area for two years; during that time he was on a 365-day per year work basis subject to the call of his employer at any time. It was reasonable to conclude that recreational activities contributed to a higher efficiency of the employer's work and that when conducted in the restricted area of employment, **on a work day, so to speak, and in a manner not prohibited by the employer,** [emphasis supplied] such activity was an incident of the employment. I further conclude that the obligations and conditions of employment created the zone of danger out of which Ecker's injury arose."

Thus, **Ecker** disappears as a basis for conflict.

ITEM 3: The legal issue in **Ecker** is whether an employee hired to work at an overseas defense base 365 days of the year is to be deemed within the course of employment when injured while engaged in recreation.

The legal issue in **Gondèck** (phrasing it as close to Ecker as possible in order to give Petitioner every benefit is whether an employee hired to work at an overseas defense base with regular hours of employment is to be deemed within the course of employment when (using the Deputy's own words and Finding in Gondeck for which see Page A15 of Petitioner's Petition for Certiorari at line 5 from top of page)

" . . . . **when, having completed his day's work . . .**" (emphasis supplied) he was injured while engaged in recreation.

The difference between the two cases is as day from night on this legal issue. (There are other differences also; the transportation, etc., but the above are the parallel differences that separated **Gondeck** from **Ecker.**)

## III

## THE MERITS — ROSE'S CASE

### Distinctions between Rose and Gondeck

Rose is a case in which compensation was granted and with good reason, if we may be permitted to say so. Rose, an American, was driving a motor scooter on Grand

Turk Island in the British Bahamas on the right side of the road—because he was an American—when he should have been on the left side according to the British rules of the road. That is what caused his death in a collision between his scooter and a truck. Said the Court: 338 Fed. at 321:

> " * * * The Commissioner drew the inference that Rose's long ingrained habit of right hand driving asserted itself when confronted with an emergency traffic situation. By veering to the right instead of to the left, he put his scooter onto a collision course."

We have no quarrel at all with this.

## IV

## THE MERITS — SMITH'S CASE

### Distinctions Between Smith and Gondeck

Smith was a passenger, with Gondeck, in the same jeep, in the same accident. The testimony and record was different in **Smith.** There is no ratiocination by the Fourth Circuit Court of Appeals in Smith nor any discussion of the principles or the pros and cons. There is a flat statement—more authoritative than persuasive—and a remark that **IF** the record in both cases were the same the Fourth Circuit would deferentially disagree with the Fifth. But is the record the same?

Apparently not: Smith, says the Fourth Circuit, "was provided sleeping quarters and meals at the power

station." Gondeck did not eat and sleep at the power station. Smith, says the Fourth Circuit, did not involve transportation supplied by the employer. Gondeck did.

The differences are substantial enough to account for the different result, but we also should like to say—and now go into—the matter of judicial review and whether **Smith** and **Ecker** are sound or products of an erroneous view pressed home by a centralized administration that is seeking a specific result not sanctioned by law and for Congress alone.

## V

## The Errors of Ecker

It is unfortunate that the compensation field has not attracted the best legal analysis, philosophy and thinking. The reason is that in the compensation field the issues did not involve substantial sums of money, until relatively recently. For example, it has been only within the last eight or ten years that many of the limits in State Compensation Acts have been removed so that for all practical purposes a workman, injured permanently and totally, will be supported for the rest of his life on a weekly payment of anywhere from $42 to $70 a week and in addition will be guaranteed such reasonable medical care and attention as the nature of the injury or the processes of recovery might require. Thus now there may be an exposure of several hundred thousand dollars whereas before it was only tens. So also the Federal Longshoremen's Compensation Act contained a limitation until 1956 when compensation for permanent and total disability became unlimited.

As a result of the inability of this field to attract the best legal analysis, research, philosophy and thinking, a great deal of lopsided information and tendentious matter has been presented to the courts. The compensation field is highly technical—as any field can be expected to become when it is comprehended entirely by a statute nearly forty years old many portions of which are "litigiously prolific" "arising out of and in the course of an enigma," and require thoughtful application to an ever-changing field. The generalization royal is apt to fall flatter in the compensation field than in many another.

So what the government has done in its centralized control and handling of the Federal Longshoremen's Compensation Act is to endeavor to see that a certain result is reached, deemed beneficent by the administrators. Indeed what has been presented as maxims in this field makes one think inevitably of Stephens' comment that considering the vast amount of misinformation conveyed by legal maxims they ought not be called maxims at all but minims.

In **Ecker** as in **Smith** there are errors due to lopsided presentation, we suggest.

## A

This Court, for example, in **Ecker** refers to Section 20(a) of the Longshoremen's Act as providing that in any proceeding for the enforcement of a claim for compensation it shall be presumed in the absence of substantial evidence to the contrary that the claim comes within the provisions of the Act. That presumption has long and uniformly—that is uniformly up to the time of the opinion in Ecker—been held to be a presumption that disap-

pears in any case where evidence is offered. See for example **John W. McGrath Corp. v. Hughes,** 264 F.2d 314 (C.A. 2d 1959).

**B**

Another is the reference to the inferences that a Deputy Commissioner may draw and the insulation of such inferences from judicial review. To use the language of the opinion in Ecker:

> "The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner are to be accepted unless they are irrational or 'unsupported by substantial evidence on the record as a whole' * * * * *"

Now the "inferences" that **Cardillo** spoke of and the inferences that **O'Leary** spoke of were inferences of fact, not inferences of law. If that is disputed and if it is now thought that Deputy Commissioners have the right to draw inferences of law then that contention was set aside and laid to rest in **O'Leary,** which very plainly applied the Administrative Procedure Act of 1946, which provides, as this Court says, that the Deputy Commissioner's Order may be suspended and set aside by a reviewing court if not in accordance with the law.

Of course it is true that questions of "law" and questions of "fact" are not easily if at all separable in many instances. (Over thirty years ago the writer concluded that abstract definitions of them were impossible. See **Alpert, Suits Against Administrative Agencies,** 12 N. Y. U. L. Q. Rev. (1935) at 398.)

Justice Frankfurter, speaking for the Court in **O'Leary**, with his usual felicity enunciated the problem and principle, 340 U.S. at 507-508, 71 S. Ct. at 472:

> "The Deputy Commissioner treated the question whether the particular rescue attempt described by the evidence was one of the class covered by the Act as a question of 'fact'. Doing so only serves to illustrate once more the variety of ascertainments covered by the blanket term 'fact'. Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law'."

The doctrines of judicial review strike with a different incidence the assortment of administrative tribunals our law displays. In addition, and as a matter of course, the doctrines of judicial review must strike the assortment of administrative awards, orders, findings, etc., with a different incidence. Some administrative orders are in the nature of rules, some in the nature of policy or procedural declarations, some in the nature of interpretation, some in the nature of the determination of an individual claim, just like a lawsuit, garden variety.

A determination by a deputy commissioner of the

compensability of a particular claim is more akin to a judicial determination of a particular case than it is to anything else.

Thus, however much it may be said that in certain instances questions of law and questions of fact become so mixed that it cannot be determined whether they are the one or the other, or partake of both, it is ineluctable that in **Ecker**, in **Smith**, in **Gondeck**, the issue was strictly one of the law.

In **Ecker** the issue was whether an employee who was working 365 days of the year was to be deemed within the course of employment when injured while engaged in reasonable recreation off the premises. In **Gondeck**, the issue was whether an employee who had regular hours of work was to be deemed injured in the course of his employment when engaged in reasonable recreation off the premises and on his own time. Note that the question is not whether a particular recreation is reasonable, but whether reasonable recreation is covered under the law—i.e., the statute.

There is no greater expertise in a deputy commissioner for a determination of this question than in a court.

The standard is so severable from the experience of industry and so basic to the legal structure as to be particularly appropriate for independent judicial ascertainment as a question of law. We will now demonstrate that.

C

The Longshoremen's Act passed in 1927, is a complete and well thought out entity. It has been construed many times and its provisions had well defined areas of application when in 1941 the matter came before Congress of providing compensation for disability or death on defense bases overseas.

The purpose of the Defense Bases Act said the House Committee in reporting it (See Report No. 1070 of the House Committee in the 77th Congress, First Session, dated July 29, 1941) is to provide substantially the same relief for injuries or death of employees at bases leased by the United States from Great Britain or any other country **as existing law provides for similar employees in the United States** and to assist contractors employing labor at such bases in obtaining compensation insurance at reasonable rates.

Had Congress wished a wider coverage to be given under the Defense Bases Act to employees at defense bases than to employees doing the same work in the United States, then Congress could have so enacted. The proof positive of this is that Congress did broaden the scope of the coverage of the Longshoremen's Act in one respect when it enacted the Defense Bases Compensation Act. It provided in Section 1651 (a)(4) of the Defense Bases Act that coverage

> "shall include any injury or death occurring to any such employee during transportation to and from his place of employment, where the em-

ployer or the United States provides the transportation or the cost thereof."

That is the only extension of coverage provided by Congress for defense base workers.

In the Federal Employees Compensation Act, for example, Congress broadened coverage to include any injury proximately resulting from a war risk hazard whether or not the injured person was in actuality engaged in the course of his employment at the time of the injury. (See 42 U.S.C. Sec. 1781.)

Because Congress did not in fact broaden the coverage in the Defense Bases Act and because the coverage was well defined in the litigation of the fourteen years previously, all of which it must be presumed Congress knew, and, knowing, approved of because Congress did not seek to change it, it is our submission that the doctrine of reasonable entertainment invented by deputy commissioners to reach what they conceive to be a beneficient result is entirely indefensible. When an Act of Congress is lacking (if it be so, which we doubt) it is not for an administrative official to invent or construct a doctrine to cover the lack that he finds in the Congressional provision.

That the deputy commissioners invented the doctrine of reasonable recreation is beyond question. An impartial observer and writer in the field, Warren L. Hannah, himself formerly a Referee of the Industrial Accident Commission in California, in his book FEDERAL REMEDIES FOR EMPLOYEE INJURIES (1955) says at page 56 to 57:

> " * * * The same construction is also placed upon the provisions governing compensability with the exception that the doctrine of so-called 'recreation activity' has been invented to apply, under certain circumstances, to off-duty injuries occurring in locations subject to Defense Bases Act jurisdiction. This doctrine is based on the assumption that the maintenance of employee morale in foreign surroundings is a matter of employer concern, that employers may under such circumstances provide certain facilities to their employees for recreational purposes, and that injuries sustained in the course of using such facilities may be treated as falling within the scope of the employment."

Indeed what the deputy commissioners have invented is an interesting and odd application of orthodox compensation law concerning resident employees and traveling employees, the orthodox law being stated in Larson **Workmen's Compensation** at Section 24.00 and 25.00

As a result of this stretching and straining there are judicial opinions saying in effect that a Defense Base worker is in the same position as a sailor—he is a captive of his place of employment and is therefore entitled to be compensated for anything that may happen to him during his employment, unless caused by his wilful, wanton and intentional misconduct. **See O'Keefe v. Pan American World Airways, Inc. (Rose's Case),** 338 F2d. 319 (C.A. 5th 1964) at bottom of right hand column on page 322. A sailor with limited maintenance and cure, with the Laws of Oleron and the doctrine of wardship, is a far cry from workmen's compensation on a defense base

that may be an island or a continent. The analogy is used, however, and the compensation act so "beneficiently" construed.

But neither deputy nor court—and certainly not deputy—has the power to invent a new cellular rule of law. It is for Congress to legislate not for deputies to invent. Or when invented to pass off as a fact rather than the new law that it is.

And note that the doctrine of reasonable recreation, first invented to apply to recreation at facilities provided by the employer — vide **O'Leary** — is extended by **Ecker** to recreation not employe provided, nor employer sponsored.

"Arising out of and in the course of employment" is the Congressional requirement. If "reasonable recreation" is to be deemed within and arising out of the course of employment for defense bases employees, it is for Congress so to declare and define the ambit. Or for a court to enunciate as a matter of law, not accept as a fact.

The determination of what reasonable recreation may be in each specific case would then be properly before a deputy commissioner. But the invention or promulgation of the doctrine of reasonable recreation, without bounds, with no channel within which the deputy commissioner must confine himself, is not within the privilege of a deputy commissioner to assert as fact insulated from review.

In **Ecker** the question before the Court was this

question of law: Is a defense base employee hired to work 365 days a year in the course of employment when he is off premises, on his personal recreation, on holiday, not using any facility of his employer? If the law is that reasonable recreation is covered, without bounds, with no channel within which the deputy commissioner must confine himself, then the answer is yes. If the law is that reasonable recreation on one's own hook, on one's own time, off premises, etc., is not covered, then no.

That is not a question of fact nor does it deal with the integrity of the administrative process. It is a question of law about as pure as they come.

It was this confusion about fact and law that actually caused the split in **Ecker.** It was this effort to cast **law** into **fact** that largely accounts for the difficulty in these cases.

We submit the Court should recede from **Ecker.**

## VI

In Gondeck there is one other matter that should be called to the attention of the Court. That is the vice in the determination by the deputy commissioner of rendering an ultimate judgment rather than making adequate findings of fact and proper conclusions of law.

It is this tendency on the part of the deputy commissioners under the Longshoremen's Act to render ultimate judgments rather than to make adequate findings of fact and conclusions of law which in part creates a cloudy atmosphere in which the government can expound

a point of view that the issue before the court is not one of law but is one in which the fact and law have become so inextricably connected that the determination is best left to a deputy commissioner.

The government in these compensation cases has borrowed heavily from those administrative determinations which partake more of policy and rule than of the rights of a specific person to collect a specific amount of money.

Once this is made to appear without the trimmings of the fancy words and of "expertise administration" the basic simplicity of what we are dealing with will emerge.

Even if certiorari were to be granted in this case, the order of the deputy did not find that the injury was one arising out of and in the course of employment. That this was so both the government and the intervenor admitted in their respective briefs before the Fifth Circuit Court of Appeals. Both argued that the finding should be said to be implicit in the conclusion of the deputy commissioner but it was our contention before the Fifth Circuit Court of Appeals that a reversal would have to take place on that ground alone. The Fifth Circuit Court of Appeals did not touch this point, however, because more basic was that the deputy's findings of fact were not supported by substantial evidence.

Thus even if certiorari were here granted, the case would have to be re-tried rather than simply having the writ issue. Re-trial after so much time and after the case was closed is an injustice.

## VII

## MOTION FOR ORAL ARGUMENT

We move, if the Court be inclined to pursue **Gondeck** further, that oral argument and full briefing be granted not only in **Gondeck** but also in **Ecker** so that these cases might be orally argued at the same time with the consequent benefit that such give and take and probing scrutiny bestows.

## VIII

It is our submission, in conclusion:

1. Time has made so many changes, irreversible in Gondeck, that time and finality require a denial of the extraordinary petition for re-hearing.

2. Justice to the Employer and Carrier, their counsel and representatives require the doctrine of finality to be applied.

3. If the rule of Gondeck is sought to be reversed it should be reversed prospectively and not retrospectively.

4. The rule in Gondeck is sound as applied to the facts in Gondeck.

5. The distinctions between Ecker and Gondeck, the working by the employee in Ecker on a 365 day per year basis, which was not true in Gondeck, the injury "on a work day, so to speak, and in a manner not prohibited by the employer", which was not true in Gondeck, make the one case not in conflict with the other.

6. The legal issue in Ecker and the legal issue in Gondeck are not the same.

7. The distinctions between Rose and Gondeck are so obvious as to require no extended discussion.

8. The difference in record between Smith and Gondeck justify, if such be, the difference in judgment.

9. The basic legal principle, in Ecker, however, although not in conflict with Gondeck, is an erroneous legal principle pressed upon the Court without due and proper analysis, research and thought.

10. The basic question in Ecker is a question of law—that of reasonable recreation—and not one of fact.

11 The doctrine of reasonable recreation is a doctrine not provided by Congress but invented by deputy commissioners and being law, is not to be accepted as fact but reviewed as law.

12. Oral argument should be granted in this case and in Ecker if the extraordinary petition for re-hearing is to be granted.

Respectfully submitted this _____ day of June, 1965.

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Miami, Florida 33130

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Response to Extraordinary Petition for Re-Hearing were served upon Arthur Roth, Esq., 1111 Ainsley Building, Miami, Florida, attorney for Petitioner, to Lloyd G. Bates, Jr., Assistant United States Attorney, Post Office Building, Miami, Florida; and to the Attorney General, Department of Justice, Washington 25, D.C., by depositing same in the United States Post Office with first class postage prepaid thereon this _____ day of _____ 1965.

_____

LEO M. ALPERT